

# Waste management and the workplace\*

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## 1 INTRODUCTION

Waste management refers to the collection, transport, processing, recycling or disposal of waste materials produced by human activity. The focus of this paper is on the role local government plays in waste management. Traditionally this has been the collection and transport of waste to landfill sites created on the edges of urban areas. However, as a result of urbanisation, population growth and increased consumption the volume of waste generated by cities has become bigger and space for landfill sites has become scarcer and more expensive.

Consequently, governments in different parts of the world have been compelled to revise their waste management policies. South Africa is no exception.<sup>1</sup> Increased attention is now being paid to the recycling of waste materials as part of a waste minimisation strategy. At the same time, government cannot be oblivious to the fact that large numbers of people are employed both in the collection of waste and in various processes of recycling.

Three broad categories of persons employed in waste management can be identified. The first is those directly employed by local authorities. The second is

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<sup>1</sup> Waste management is a local government competence in terms of Schedule 5B of the Constitution (Constitution of the Republic of South Africa, 1996). The Local Government Systems Act 32 of 2000 specifies the obligations of local government in this regard. In terms of the recently-adopted National Environmental Management: Waste Act 59 of 2008 ("Waste Act") the aims of reducing, reusing and recycling waste so as to send less waste to landfill sites are specifically endorsed.

those employed by private contractors or intermediaries providing waste management services to local authorities.<sup>2</sup> The third category comprises those who collect, sort and sell recyclables in order to survive.<sup>3</sup> In some countries they style themselves “waste pickers”. They have also been characterised as “self-employed proletarians”.<sup>4</sup> In this paper we shall simply refer to them as the self-employed.

Although the term “self-employed” suggests individuals operating on their own, we understand it to include family units or clusters of individuals operating together as an enterprise. For the self-employed do cooperate with one another in various ways. In some countries, notably in Latin America, cooperation has developed to the point where the self-employed have formed cooperatives and community-based associations in order to advance their interests.<sup>5</sup> This development is in its infancy in South Africa. One of the questions raised in this analysis is whether it should be more actively promoted.

The “informal economy”, as defined by the International Labour Organisation (ILO), refers to “all economic activities by workers and economic units that are – in law or practice – not covered or insufficiently covered by formal arrangements.”<sup>6</sup> This definition of the informal economy would certainly encompass the self-employed. It is also broad enough to include workers employed by private contractors or intermediaries insofar as they are not covered, or insufficiently covered, by labour legislation and other protective regulations. But how, practically, is it possible to extend rights to workers such as these?

To address this question, we take as a case study waste management in the City of Cape Town (“the City”). We regard all persons engaged in the collection, sorting and selling of recyclables as workers, consistent with a notion of work as encompassing all forms of employment, including self-employment. As in other developing countries,<sup>7</sup> we argue that the self-employed supplement municipal waste management services. Their role, together with that of workers employed by

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<sup>2</sup> The term intermediary as it is used here incorporates temporary employment agencies, or temporary employment services as they are termed in labour legislation, or labour brokers as they are commonly called. In terms of section 198 of the Labour Relations Act (Act 66 of 1995) a temporary employment service is the employer of workers it procures or provides to a client.

<sup>3</sup> The range of materials that waste pickers collect varies from city to city. The broad categories of what is normally collected include scrap metal, glass, cans, plastic and paper because they are in demand with recyclers.

<sup>4</sup> Birbeck “Self-employed proletarians in an informal factory: the case of Cali’s garbage dump” (1978) *World Development* 6 (9/10) 1173.

<sup>5</sup> Medina “Waste picker cooperatives in developing countries”: Paper prepared for WIEGO/Cornell/SEWA Conference on Membership-based Organizations of the Poor, Ahmedabad, India (2005) 20; Bonner “Waste pickers without frontiers” (2008) *South African Labour Bulletin* 32(4) 7; Tejani “Scrap-collectors fight for and win a new legitimacy” *InfoChange News & Features* (April 2003).

<sup>6</sup> See ILO Resolution concerning decent work and the informal economy, adopted by the General Conference at its 90<sup>th</sup> Session (2002).

<sup>7</sup> Coad “Solid Waste collection that benefits the urban poor”: Workshop Report, Collaborative Working Group on Solid Waste Management in Low- and Middle Income Countries, Dar es Salaam, Tanzania, 9-14 March 2003 at 12.

contractors and intermediaries, should therefore also be seen as integral to the waste management function of local government.

In the next section of this paper we consider the waste management strategies of the City, and how the City has determined through these strategies what employment opportunities exist and for which categories of workers. What these strategies boil down to are forms of externalisation. On the one hand the City retains a minimum “core” workforce that it directly employs. On the other, the employment of all other workers the City requires to fulfill its obligations to the citizenry is actually or in effect regulated by the commercial terms agreed to between it and the service providers, intermediaries or between various recyclers operating under its aegis, as elaborated below.<sup>8</sup>

Externalisation, we argue in section 3, can be regarded as a form of regulation. To understand how it operates it is necessary to lift the “contractual veil” that externalisation creates and identify the person that ultimately determines the conditions of work, namely the City. Its outcome is to establish a hierarchy of rights in which workers directly employed by local authorities are protected by formal regulation, workers employed by contractors and private agents are partially protected, as we shall explain, and the self-employed are unprotected. Increased inequality is thus another outcome.

Lifting the “contractual veil”, however, does not provide workers who are partially protected or unprotected with a remedy against the City. It only provides an argument as to why the City should be held liable for categories of workers whom, as a rule, the City does not regard as its responsibility. Our point of departure is that it is unlikely that workers who are partially protected or unprotected will be able to persuade the City to regard them as its responsibility, or achieve any significant improvement in their position, if they are not organised, although the question as what form of organisation(s) is appropriate has still to be addressed.

If a project of organising workers *qua* workers is viable, there must be a workplace where workers are associated. It is also only in terms of such a workplace and in comparison with other workers that the hierarchy of rights referred to is visible and progress in reducing it will be measurable. However, for reasons elaborated in section 4, this cannot be the workplace as defined in labour legislation. Instead we argue for extending the existing notion of the workplace to including employees of contractors and intermediaries supplying services to the City and the self-employed.

There are essentially two kinds of organisational strategies that could be adopted to engage with the City on the basis of this extended notion of the workplace. The one is a trade union strategy to address the issue of inequality in the extended notion of

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<sup>8</sup> Theron and Godfrey *Protecting Workers on the Periphery* Labour and Development monograph 1/2000, University of Cape Town (2000); Theron “Employment is not what it used to be” in Webster and Von Holdt (eds) *Beyond the Apartheid Workplace: Studies in Transition* University of Kwazulu Natal (2005) 293.

the workplace through a process of collective bargaining and the exercise of power. The other is to do what is being done in Latin America, through the self-employed associating in cooperatives or similar entities to provide services to the local authority. A case study of such an initiative in the City is outlined.

## 2 THE WASTE MANAGEMENT STRATEGIES OF THE CITY

The strategies adopted by the City to manage waste conform to a conception of the role of the state that has been in vogue globally and is associated with the promotion of “public-private partnerships” (PPPs) as a method of having public goods wholly or partially produced by the private sector.<sup>9</sup> These strategies must also be understood in the context of the political transition in South Africa post-1994.

In 1997 the 39 municipalities serving the various racially segregated suburbs of the City were restructured into seven municipal service structures and in 2000 the so-called “Unicity” was established.<sup>10</sup> Yet the legacy of institutional fragmentation and social inequality (coupled with differential tariff structures) remained. No doubt ongoing political tensions within the City have made it more difficult to address this legacy.<sup>11</sup> Yet the fundamental problem is one affecting all local authorities: existing budgets have been insufficient to meet increased demands for service delivery.

This situation was exacerbated by a change of macro-economic policy in 1996. The Reconstruction and Development Programme (RDP) provided a lifeline tariff<sup>12</sup> to give all citizens access to the most basic services. The Growth Employment and Redistribution (GEAR) policy that supplanted it emphasised the full recovery of costs from all users.<sup>13</sup> As a result central government financial assistance to local government diminished drastically.<sup>14</sup>

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<sup>9</sup> Kihato and Schmitz “Enhancing policy implementation: Lessons from the water sector” Centre for Policy Studies Research Report No. 95 (October 2002) at 6. Some (in our opinion, correctly) regard any agent who is not public as “private”, including for instance CBOs and NGOs (Ahmed and Ali “Partnerships for solid waste management in developing countries: linking theories to realities” *Habitat International* 28 (2004) 467 at 469). Others regard “private” as comprising the comparatively large, for-profit, commercial organisations.

<sup>10</sup> Ferrara *et al* “Opportunities in Waste: From Cape Town to Ruiru”, Working Draft, Economic and Political Development Final Workshop Report, School of International and Public Affairs, Columbia University, New York (2008).

<sup>11</sup> The current Mayor leads a multi-party coalition headed by the Democratic Alliance. Tension both within this coalition and between the coalition and the ruling ANC has at times been high.

<sup>12</sup> A lifeline tariff (also called a “social tariff”) is a pricing strategy designed to provide minimal amounts of water and electricity either for free or at very low prices to poor households. Additional amounts carry increasing per-volume prices. (From: Water and Sanitation for all: A Practitioner’s Companion. Go to: <http://web.mit.edu/urbanupgrading/waterandsanitation/resources/definitions.html>)

<sup>13</sup> Miraftab “Neoliberalism and casualization of public sector services: the case of waste collection services in Cape Town, South Africa” (2004) *International Journal of Urban and Regional Research* 28(4) 874 at 877.

<sup>14</sup> The Financial and Fiscal Commission reported that by 2001 the amount of intergovernmental grants from central to local levels in real terms had fallen by 85% compared to 1991: International Labour

The strategy adopted by local governments to cope with the situation in which they were placed was to engage external service providers to provide municipal services.<sup>15</sup> In these circumstances PPPs have become a euphemism for privatisation.<sup>16</sup> Privatisation in turn is no more than externalisation in the context of the public sector. The Local Government: Municipal Systems Act,<sup>17</sup> which seeks to regulate the appointment of external service providers, does not appear to have constrained local government in this regard.<sup>18</sup>

In Cape Town this process began with the introduction of a scheme to provide cleaning services in Khayalitsha, its largest township. The parties to this scheme, initially known as the Billy Hattingh Scheme,<sup>19</sup> were the local authority, township-based entrepreneurs and a private company ostensibly acting as a mentor to the entrepreneurs. Each entrepreneur was allocated a truck and paid a monthly fee to provide a waste collection service. The fee was intended to cover the costs of the vehicle and the wages of the workers employed to assist him.<sup>20</sup>

The scheme achieved significant savings for the City<sup>21</sup> but was mired in controversy. The SA Municipal Workers Union (SAMWU) saw it as threatening the employment security of their members. After a protracted dispute the Labour Court upheld local government's right to introduce such a scheme.<sup>22</sup> A subsequent

Research Group (ILRIG) "PPPS: a questionable strategy for service delivery" Unpublished paper (2001) cited in Miraftab (fn 13 above) at 876.

<sup>15</sup> Miraftab (fn 13 above) at 877.

<sup>16</sup> See Mitchell-Weaver and Manning "Public-private partnerships in third world development: a conceptual overview" (1991) *Studies in Comparative International Development* 26 (4) 45. The authors argue that the term should only be used in the context where there is an ongoing set of interactions which require "real partnership" between the state on the one side and the private sector and civil society on the other side. A "real partnership" assumes that the parties have combined forces to define and/or accomplish an objective. While there will be a division of labour between the partners, a PPP should not be a silent partnership in which one of the parties provides only the capital necessary to implement the venture. They posit that most supposed PPPs in developing countries do not meet these criteria: at 48-49.

<sup>17</sup> Act 32 of 2000.

<sup>18</sup> The Municipal Systems Act sanctions the appointment of "appropriate" external service providers to provide municipal services only after a fairly rigorous process, including consultation with the community where the service is to be provided, an assessment of the various service delivery options, including "the direct and indirect costs and benefits" associated with the proposal and a feasibility study. Further research is needed to establish to what extent this process is complied with: see ss 11(3)(f) and 78 (3).

<sup>19</sup> The scheme was initially established under the jurisdiction of City of Tygerberg, one of the seven local authorities that formed the Unicity. It was later renamed The Entrepreneurial Development Corporation (Tedcor) scheme.

<sup>20</sup> Miraftab (fn 13 above) 881; Samson "Organizing in the informal economy: a case study of the municipal waste management industry in South Africa" SEED Working Paper No. 66, ILO (2004) 35.

<sup>21</sup> Before the introduction of the Billy Hattingh Scheme, the City of Cape Town was spending R11m per year to clean up Khayelitsha. The Billy Hattingh scheme would cost the council only R4.7m per year: Qotole and Xali "Selling privatization to the poor: the Billy Hattingh community-based refuse removal Scheme in Khayelitsha" in Qotole, Xali & Barchiesi (eds) *The commercialization of waste management in South Africa* Occasional Papers Series No 3, Municipal Services Project (2001) 8.

<sup>22</sup> *City of Tygerberg v SA Municipal Workers Union and Others* (1999) 20 ILJ 1032 (LC).

controversy arose regarding the company's role in acting as a financial intermediary between the entrepreneurs and the City,<sup>23</sup> and about the fees paid to entrepreneurs.<sup>24</sup> Significantly, this fee was referred to as a "salary".<sup>25</sup> Ultimately the scheme was abandoned.

However, abandonment of the scheme did not mean abandonment of the strategy of engaging private contractors. Instead the City began entering into what have been referred to in the literature as "one-man" contracts. These were contracts with entrepreneurs from informal settlements who were supposed to recruit and hire workers to clean up the area where they reside.<sup>26</sup> After some time the City scrapped the requirement that entrepreneurs had to reside in the area in which the service operated. Instead it has been contracting with established firms providing waste management services and black-owned enterprises that comply with the objectives of government's black economic empowerment (BEE) policies.

As a consequence, all waste collection in informal areas, where a significant proportion of the City's population stays, is done by private contractors.<sup>27</sup> Private contractors, in turn, employ the workers who collect the refuse in black bags that are then deposited either in an open skip or a shipping container. These contractors are paid per dwelling serviced.<sup>28</sup> A more established contractor then transports the waste refuse from there to the municipal dump.

In the formal residential areas, by way of contrast, it is primarily local government employees that carry out waste collection. "Formal" in this context refers to residential areas that have paved streets and sidewalks, where the comparatively sophisticated system of 240-litre wheeled containers (commonly referred to as "wheelie bins") can be deployed. These are emptied once weekly by compactor trucks fitted with hydraulic lifts.

About 25 percent of waste collected in these formal areas is collected by private contractors. It is not entirely clear on what basis the City opts to appoint private contractors, but it appears to relate to the City's capacity to provide the service. In commercial and industrial areas, waste may be collected either by private contractors or by arrangement with the City.<sup>29</sup>

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<sup>23</sup> Miraftab (fn 13 above) 881; Samson (fn 20 above) 35.

<sup>24</sup> Visser and Theron "Waste not: Externalisation and the management of waste in Cape Town" PLAAS conference on "Working on the Margins" (26-27 March 2009) 8.

<sup>25</sup> Samson (fn 20 above) 35.

<sup>26</sup> Miraftab (fn 13 above) 882.

<sup>27</sup> The total number of informal households serviced by the City was 195 185 in 2008, compared with 787 489 formal households. However, the number of informal households serviced is not the totality of informal households, and it does not appear that the City knows the number of informal households.

<sup>28</sup> Dwellings are counted on a six-monthly basis because of the fast pace of migration.

<sup>29</sup> If a business chooses to make use of a commercial waste collection company, the City can request proof of the contract entered with the waste collection company. According to a City official, such proof is required to deter companies from cutting costs by merely dumping their waste.

Although recycling (or waste minimisation) is acknowledged to be a local government responsibility,<sup>30</sup> very few resources have been allocated to this function. The City has established drop-off centres where residents may deliver garden refuse, building rubble and recyclable material. It also owns a Material Recovery Facility and equipment where recyclable material is salvaged. However, the lion's share of the capital budget is still spent on landfill infrastructure and associated services.<sup>31</sup>

In part this is because the City relies on private contractors to fulfil its responsibilities. Out of a total of twenty drop-off centres, eight are operated by private contractors. A private contractor also operates the Material Recovery Facility. But a more fundamental problem is that the drop-off centres rely on the public to deliver recyclables, and this is only a fraction of the waste that is sent to land-fill sites.

The City has also been piloting a scheme to separate recyclables "at source" by requesting home owners in the formal, predominantly middle-class areas to put recyclables in a separate bag on top of their "wheelie-bins." The effect of this scheme will be to eliminate opportunities for the self-employed who make a living from separating recyclables. It will also help keep them out of middle-class areas. This may even be a selling point for the scheme in these areas.

In summary, the City has not created direct employment through its waste management strategies. It has also not directed its strategies at enhancing opportunities for the self-employed. The indications are rather that it intends shutting down such opportunities. Where it has created opportunities of employment, is with private contractors and intermediaries. In some instances such intermediaries are engaged by the City and in some instances by the private contractor in terms of a subcontracting agreement or to supplement the contractor's own workforce.

### **3 LIFTING THE "CONTRACTUAL VEIL"**

In interviews with the City's Solid Waste Department, the justification for engaging external service providers is, as one would expect, operational in nature. In the case of waste collection, private contractors are said to be less constrained by red tape, and therefore able to deliver a speedier service.<sup>32</sup> It is also argued that the costs of

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<sup>30</sup> The objective is to achieve "zero waste". The National Environmental Management Act 107 of 1998 (NEMA) and the National Environmental Management: Waste Management Bill 39 of 2007 stipulate that municipalities should minimise waste in order to achieve the long-term "zero waste" goal. See also the website of the City of Cape Town's Solid Waste Department (<http://www.capetown.gov.za/en/solidwaste/Pages/default.aspx>) as well as the City's Integrated Waste Management Policy.

<sup>31</sup> This is despite the fact that only three of the City's six landfill sites are still in operation and are estimated to reach capacity within the next five to 13 years. See Sustainability Institute "Integrated Analysis Solid Waste Baseline Report" UNDP Project No. 00038512 (2007) 75.

<sup>32</sup> Interview with City official, cited by Visser & Theron (fn 24 above) 20.

maintaining a fleet of collection trucks are lower, because the vehicles owned by private contractors are newer and less prone to breakdowns than the City's fleet.<sup>33</sup>

But arguments such as these do not stand up to scrutiny. It may be that the City has to follow more cumbersome procedures to acquire new vehicles, but the more fundamental question is why the City has not invested resources in upgrading its capacity. Clearly cost is the primary consideration. Since waste collection is a labour-intensive operation, the most important cost is undoubtedly that of labour.

Workers directly employed by the City are covered by a bargaining council agreement for local government<sup>34</sup> that is negotiated nationally. Workers engaged by private contractors are not regarded as falling within the scope of the SALGBC. Miraftab,<sup>35</sup> Samson<sup>36</sup> and Qotole and Xali<sup>37</sup> all concur that, by engaging private service providers, local government has eroded labour standards. This is not surprising. Workers employed by contractors earn about half of what their counterparts in the City earn, not taking into account the fringe benefits the latter enjoy, which are a significant proportion of their total wage.

Table 1 provides some indication of the disparities in minimum wages between the core workforce directly employed by the City and employees of different categories of contractors engaged in waste collection. There is no data regarding the wages of workers employed by labour brokers, but these would vary between those engaged to work for the City and those engaged to work for contractors engaged by the City.

	<b>City</b>	<b>Commercial contractors</b>	<b>BEE start-ups</b>
Regulating Body	SALGBC	NBCRFI	Not applicable
Weekly wage: Truck drivers	R1582 (Basic) to R2215.30	R888 to R1468	Not applicable
Weekly wages: general workers and truck assistants	R946.15	R323 to R634	R420 to R444

<sup>33</sup> It is claimed the average truck used by the City's Solid Waste Department is eight years old. See the City's Solid Waste Management Dept Integrated Waste Management and Service Delivery Sector Plan (2008) 5 at [http://www.capetown.gov.za/en/IDP/Documents/Statutory%20compliance\\_%20plans/I%20Waste%20Plan%20SWM%2017\\_01\\_08%20\(final\).pdf](http://www.capetown.gov.za/en/IDP/Documents/Statutory%20compliance_%20plans/I%20Waste%20Plan%20SWM%2017_01_08%20(final).pdf)

<sup>34</sup> The South African Local Government Bargaining Council (SALGBC).

<sup>35</sup> Fn 13 above.

<sup>36</sup> Fn 20 above.

<sup>37</sup> Fn 21 above.

We do not know the number of workers employed by contractors. However, there are indications that it could be as much as 40 percent of the number employed directly by the City. It is also not known what number are employed by labour brokers or what they earn. Whatever the actual figures, it is clear that it represents a massive cost saving to the City to have contractors employ these workers and that it would not be conceivable for the City to employ an equivalent number directly within existing budgetary parameters.

If externalisation is regarded as a system of regulation, the object of regulation would be the employment relationship, and the means utilised would be the contract between the City (as the entity procuring goods or utilising services) and the person providing goods or services (in this case the contractor or intermediary). In the private sector the terms of such commercial contracts are as a rule not disclosed to non-parties, in accordance with notions about the “privity of contract” that private sector lawyers fiercely defend.

In the context of the public sector, however, it can be argued that such contracts are public documents to which interested parties such as trade unions and others have a right of access.<sup>38</sup> The conditions on which service providers may tender for contracts are also published. It is therefore possible to know, in the case of the City, with what requirements a contractor must comply. From these requirements, as well as requirements which the City disregards, or regards as being of lesser importance, it is possible to form a clearer picture as to how this contract regulates the employment relationship between contractors and their workforces.<sup>39</sup>

Tender documents require that contractors comply with labour legislation.<sup>40</sup> However, this represents no safeguard for the workers of the contractor, who have no recourse to the City should their rights be violated. The sub-text of a generalised requirement of this kind is rather that compliance with labour legislation is the contractors’ responsibility.

In respect of other conditions of employment, tender documents are more specific. As regards health and safety, for example, tender documents require that workers employed by private contractors must be provided with the necessary personal protective equipment and that contractors must provide proof of registration for the purposes of compensation for occupational injuries and diseases.<sup>41</sup> In the case of the

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<sup>38</sup> In terms of the Promotion of Access to Information Act 2 of 2000 any person would be entitled to request access to such contracts. However, it does not appear likely that the contents of such contracts would in fact be made known without the threat of litigation, and it also does not appear that there has been any litigation arising out of the refusal to disclose such information.

<sup>39</sup> It is unclear whether contracts to engage labour brokers are put out to tender.

<sup>40</sup> Specific reference is made to the Labour Relations Act 66 of 1995 (“LRA”) and the Basic Conditions of Employment Act 75 of 1997 (“BCEA”).

<sup>41</sup> In terms of s 80 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993. See also Tender document number: 495S/2007/2008. In fact, the indications were that the personal protective

“community-based” contracts the City stipulates how many workers and supervisors the contractor should employ<sup>42</sup> and their working hours, as well as the minimum wage for general workers.<sup>43</sup>

The City would contend that stipulations such as these are necessary because it is accountable to the residents for the services it provides, and a breakdown in labour relations may result in a breakdown in service. This was demonstrated in 2009 when the two largest unions representing municipal employees went on strike over wages and other issues and there was trashing of refuse in the streets. However, we suggest that such stipulations are tantamount to an acknowledgment that the City is in effect the employer, and are not suggestive of an “arms-length” transaction with an independent entity.<sup>44</sup> Although the City does not have any effective system of monitoring compliance with these conditions, the risk of losing a contract must operate as a powerful deterrent in the competitive circumstances in which contractors operate.

The primary concern of workers employed by contractors is probably employment security. Most contracts between the City and private contractors are for three years and, almost invariably, the workers employed by private contractors are employed on fixed-term contracts of shorter duration. In most instances these are for one year.<sup>45</sup> Indeed, the tender specifications for waste collection in informal areas requires that workers only be appointed on one-year contracts. The legal effect of this situation is that, once the term expires, the worker is not dismissed and can have no claim against his employer based on unfair dismissal.<sup>46</sup>

As a consequence, employment by a private contractor is highly insecure. By the same token, although in theory these workers have the right to associate and to organise, in practice they are unable to exercise these rights. This is both because their employment is insecure and because, to exercise the organisational rights provided in labour legislation, a trade union first has to establish it is sufficiently representative in the workplace of the employer.<sup>47</sup> Many of the black-owned

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equipment issued by private contractors was insufficient. Some workers interviewed in the course of this study reported that they were only issued with gloves and no overalls, safety boots or masks. One worker bought his own mask.

<sup>42</sup> It is significant that the City is far more prescriptive in respect of the “community-based” contracts than in its tender requirements for formal areas.

<sup>43</sup> This wage was based on Wage Determination 467 for Unskilled Labour: Certain Areas, 1991. However, this wage determination was cancelled in 2007 and is therefore of no legal effect.

<sup>44</sup> A legal argument that could be pursued on the basis of such stipulations is that the City should be regarded as the employer in law, together with the contractor.

<sup>45</sup> Only one contractor that was interviewed in the course of this study – a major waste collection company – employed workers on a permanent basis. However, this company also made extensive use of two labour brokers (or temporary employment agencies): about 60 percent of its wage bill consisted of payments to labour brokers.

<sup>46</sup> The only circumstance in which the worker could allege he was dismissed was if there was a reasonable expectation the contract might be renewed: see s 186(1)(b), LRA.

<sup>47</sup> Chapter 3, LRA; see ss 11-22.

enterprises contracted to the City are home-based or do not have anything resembling a workplace in the sense of a place where workers work. It is, in any event, in respect of the work they do in and for the City, and not in some notional workplace of their employer, that these workers have power as a collective.

The operational arguments for externalisation in respect of recycling (or waste minimisation) appear, upon first consideration, somewhat more persuasive than in the case of waste collection. Specialised equipment is required to recycle and the Department does not have it.<sup>48</sup> Instead of acquiring the equipment, it is argued that it makes more sense to contract out to the private sector. The City lacks expertise to identify and negotiate with the buyers for recyclables. This is better left to private agents. Recycling is in any event not a “core competency” of the Solid Waste Department.<sup>49</sup>

“Core competency” is a term of indeterminate meaning that is routinely advanced to justify outsourcing. However, to argue that recycling is not a core competency in this instance flies in the face of the provisions of the Waste Act,<sup>50</sup> in terms of which waste minimisation becomes a local government responsibility. There are also operational arguments as to why the City’s recycling strategies are problematic and why the justifications for externalising this function do not hold water.

The recycling rate achieved by the contractor at the City’s Material Recovery Facility, for example, has been unimpressive. Although the City has set him the target of salvaging 10-15 percent of recyclables from the mixed waste delivered to the Centre, the contractor has only managed to salvage about 5 percent.<sup>51</sup> It is also questionable whether specialised machinery is required to sort the bulk of recyclable material currently directed to landfill sites. Elsewhere in the developing world informal collectors have been able to achieve much higher recycling rates than the formal private sector, without “developed world” technology.<sup>52</sup>

The City also does not have to search far to find buyers for recyclables. Glass recycling, for example, is dominated by a single large buyer, the paper recycling industry by two dominant players, with only the plastics recycling sector operating

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<sup>48</sup> For instance, the City’s Solid Waste Department argues that specialised, expensive recycling equipment is required at drop-off centres to recycle garden waste and building rubble. Also, the compactor trucks used for waste collection are not suitable for collecting recyclables because they crush refuse indiscriminately and make the sorting of waste more difficult.

<sup>49</sup> City official, cited by Visser & Theron (fn 24 above) 20.

<sup>50</sup> Fn 1 above.

<sup>51</sup> Interview with City official, cited by Visser & Theron (fn 24 above) 16.

<sup>52</sup> Wilson *et al* have found that the informal sector manages to retrieve 20% to 50% of recyclable material from mixed waste: see “Building recycling rates through the informal sector” *Waste Management* Vol 29(2) (2009) 629. In Cairo, the Zabbaleen community was reported to recover between 80-85% of recyclables due their intensive manual sorting and expertise: see Iskandar “Urban waste managers in Cairo: waste collectors, traders and recyclers”: Proceedings of the Tenth International Waste Management and Landfill Symposium, Sardinia, 3-7 October 2005. In spite of this, the municipality of Cairo contracted multi-national corporations to take over the waste management system.

under highly competitive and dynamic free market principles.<sup>53</sup> The City would also have considerable negotiating power with recyclers. Its negotiating power would, of course, be enhanced if it were directly responsible for the entire process of collecting and sorting of recyclable material.

There may be various reasons why the City is not willing to assume responsibility for the entire waste management process but, more clearly in the case of recycling than in the case of waste collection, it certainly has to do with the kind of enterprises that the City is promoting, which in turn determines the kind of employment opportunities it wishes to create. The effect of the pilot scheme to separate waste “at source”, discussed above, was to limit opportunities for the self-employed to make a living from separating recyclables. This is because it would, if successful, cut off their access to a comparatively lucrative waste stream.<sup>54</sup> A scheme that created opportunities for the self-employed, on the other hand, would assign them a central role in the separation of waste “at source”.

As it happened, the pilot failed initially because the contractors did not deem it profitable enough.<sup>55</sup> The City’s response was not to question whether it should be reliant on private contractors, but rather to introduce a subsidy for the contractors involved. In terms hereof contractors are paid both by the recycler for material delivered and by the City.<sup>56</sup> What the City pays contractors, according to one such contractor interviewed, was much more than he received from the recyclers. He reported that his business had grown five-fold.<sup>57</sup>

This is also not the only instance where the City subsidises contractors engaged in recycling.<sup>58</sup> It also seems that contractors who provide waste collection services are generously remunerated. One contractor interviewed estimated that the City paid him three times more than he was paid for an equivalent service rendered to another contractor to whom he was sub-contracted.

In summary, it is perhaps not surprising that there is a class dimension in how waste is managed in the City. This is evident in the different waste management strategies the City utilises, and perhaps even the fact that different divisions in the

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<sup>53</sup> Lowitt “A preliminary analysis of the plastics, paper and glass recycling database: an introduction to the nature and dynamics of the industry” Centre for Poverty, Employment and Growth, HSRC (2008) 9.

<sup>54</sup> Middle-class areas are regarded as generating far more recyclable waste than poor or working class areas.

<sup>55</sup> The pilot, referred to as the Yellow Bag System, was launched at Marina da Gama in the Southern Peninsula in 2002.

<sup>56</sup> Interview with City official, cited in Visser & Theron (fn 24 above) 16. The City pays the contractor a set price for each kilogram of recyclables sold to the recycler.

<sup>57</sup> Interview with city official, cited in Visser & Theron (fn 24 above) 21.

<sup>58</sup> Contractors at drop-off sites are subsidised in that the Department pays them a set fee for each skip of green waste that is sold for composting. The drop-off centres directly managed by the City do not compete with them in that no chipping or composting or sorting of recyclable material takes place there: Interview with City official, cited in Visser & Theron (fn 24 above). See also <http://www.capetown.gov.za/en/solidwaste/Pages/Dropofffacilities.aspx>.

City are responsible for implementing these strategies.<sup>59</sup> It is also evident from the apparent zeal with which it is promoting a new class of employers.

But the enterprises these employers operate are satellites of the City, dependent on its largesse. Their viability also depends on their exclusion from the wage regime applicable to the City, namely the bargaining council agreement. Accordingly, the outcome is the establishment of a hierarchy in which those who are directly employed can be characterised as insiders and those who are not directly employed are not insiders.

In terms of income the self-employed are at the bottom of this hierarchy. They also do not enjoy the benefit of any of the protective provisions of labour legislation because they are not regarded as employees. At the same time we have argued that employment security is critical for workers to be able to associate and organise. It is arguable that the self-employed enjoy greater employment security than workers employed by contractors. It also appears that the prospects of organising the self-employed are better.

Workers employed by contractors are, in any event, only able to derive a benefit from labour legislation for the limited periods that they are employed. Most, as already pointed out, are on one-year contracts. It is in this context that the possibility of accommodating the self-employed in the City's waste management strategies must be considered.

#### **4 EXTENDING THE NOTION OF THE WORKPLACE**

Existing patterns of organisation reinforce the hierarchy we have described. The City's core workforce is unionised and the employees of contractors and intermediaries, with few exceptions, are not. There is no apparent relationship between the foregoing workers and the self-employed, although they are in contact with one another, in the streets of the City or at drop-off sites and land-fills.

During the 2009 strike SAMWU demanded that the City directly employ certain municipal workers provided through labour brokers and contractors. This represents some recognition that there are workers who are not employed by the City who are nevertheless engaged in municipal work. However, it appears that this demand was primarily directed at the increased utilisation of labour brokers. The utilisation of labour brokers in all sectors of the economy has since become a political issue that has been taken up by organised labour as a whole.

Underpinning recent calls to ban labour brokers appears to be an assumption that this will result in the workers concerned being directly employed. However, the case

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<sup>59</sup> Waste collection in informal areas is the responsibility of an Area Cleansing Division whereas the compactor trucks used in formal areas is the responsibility of the Collections Division. The operational rationale for this division is that the compactor trucks cannot access the narrow, unpaved streets in these areas.

of waste management makes clear that labour broking is an aspect of a far larger problem of indirect employment which includes all the workers currently in waste collection who are employed by contractors as well as the self-employed. Focusing on an aspect of the problem distracts from a consideration of the whole.

Moreover, a demand to directly employ workers is only likely to succeed in respect of workers employed by contractors and intermediaries and to a very limited extent, particularly if workers employed by contractors are to be appointed on the same terms and conditions as those who are directly employed. The budgetary consequences of directly employing the number of workers involved would be massive, as indicated. The problem of inequality between the different categories of municipal workers would therefore remain. The situation of the self-employed engaged in municipal work would also not have been addressed.

The fundamental reason why there is no recognition of the extent of inequality between the different categories of municipal workers, including the self-employed, relates to the way in which the workplace is conceived. In South African labour legislation the workplace is the place or places where the employees of an employer work.<sup>60</sup> Thus, although “workplace” is necessarily a spatial concept, the definition assumes there is a separate and distinct workplace for each employer. To this extent it is the status of the employer rather than the physical space where he or she actually operates that is determinative. However, this legal definition is increasingly at odds with the way in which employment is in fact structured as a consequence of externalisation, as the case of waste management illustrates.

One legal consequence of a definition that is at odds with reality has already been noted. It is difficult for a trade union to establish that it is sufficiently representative in the workplace in order to qualify for organisational rights. A no less important consequence is to render inequality in the physical space where workers actually work invisible, or to disregard it. Put differently, so long as workers accept a definition of the workplace in which the status of the employer trumps space, there can be no question of solidarity between the different categories of workers.

If, however, the concept of a workplace can be extended to encompass all categories of workers engaged in municipal work, as defined in the introductory section of this paper, lifting the corporate veil provides a basis for engaging with the City regarding the nature of the subsidies it provides to certain enterprises and interrogating its waste management policies; more specifically, who benefits from these policies and what opportunities for employment it creates. Such a process of engagement could, indeed, address the situation of the self-employed who are or may be disadvantaged by the City’s policies.

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<sup>60</sup> Where the employer has more than one operation, as in the case of the City, it may include all the places where employees work: s 213, LRA. This definition is subject to certain qualifications that are not relevant in this context.

The concept of a workplace proposed here, therefore, is a defined physical space where workers, whether employed by one or more employers or self-employed, are engaged in a common economic activity or in different aspects of the same economic activity. In accommodating the self-employed within the same workplace, and specifically their right to associate, a trade union may not be the appropriate organisation. At the same time, whatever form of organisation was adopted, recognition by trade unions of the self-employed as being part of the same workplace, and support for their demands, could play a critical role in ensuring that organisation's sustainability.

In this regard it is useful to consider the experience of a community initiative in one of the more affluent suburbs of the City, established at one of the City's drop-off centres. This drop-off centre was managed by a private contractor. Residents of the suburb became irate when they realised that the recyclables they delivered were not being sorted and sold to the recycler but simply directed to a landfill site. Following discussions with the City and the contractor, community members were eventually given access to the site and allowed to sort and sell the recyclables themselves, without pay or subsidy from either the contractor or the City. The contractor, however, continues to be paid by the City to manage the drop-off centre. He also charges for the transportation of sorted recyclables to the recyclers.

The City justifies its refusal to pay the community representatives on the ground that it already paid the contractor to fulfil this service.<sup>61</sup> At the same time it has been slow to take any practical steps to support them: after repeated requests over some eighteen months the community have secured two chemical toilets and a promise of a solid structure where the workers who sort the waste, most of whom reside in an informal settlement in a nearby township, would have some protection against the elements. After some deliberation these workers decided to form a cooperative, and in October 2008 were invited to tender for the management of the drop-off site.

The only income the cooperative generates is through the sale of recyclables. After paying their expenses the proceeds are divided among the ten members. Each earns an average of about R1 500 per month. Some would argue that this is not a living wage. Yet, with more supportive policies on the part of the City, the income of the cooperative would surely improve. More importantly, what members earn from a cooperative is not comparable to wages earned from an employer. The value of having one's own enterprise cannot be quantified. This, we would argue, is the kind of empowerment government should be promoting, rather than the enrichment of a few individuals.

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<sup>61</sup> Interview with City official, cited in Visser & Theron (fn 24 above) 31.

## 5 CONCLUSION

The South African labour legislation adopted post-1994 is often portrayed as among the most advanced in the world and is generally seen as effectively protecting the security of employment of employees as well as their rights to associate and to organise. It is also generally assumed that it effectively deals with the issue of inequality in the workplace. The recent debate about labour broking has to some extent disturbed this triumphalist narrative. However, labour broking must be seen as part and parcel of the more extensive phenomenon of externalisation, for which there are no simple solutions.

The question raised in the introductory section of this paper is how, practically, one extends rights to workers in the informal economy. In the case of waste management in the City, workers in the informal economy include workers employed by satellite enterprises providing cleaning and recycling services. In externalising these functions the City has done, to a greater or lesser extent, what other local authorities have done. Waste management is only one of various kinds of municipal work that have been externalised. The City has since been embroiled in a dispute involving another set of workers, the parking attendants that patrol the City's parking areas.

The other category of informal worker considered here is the self-employed. The self-employed, the workers employed by contractors and those directly employed by the municipality all operate in the same physical spaces, performing the same kind of work. There is no realistic prospect, we have argued, of all the workers being directly employed. So the demands of these different categories will probably be different: some may demand trade union rights while others may demand recognition and support as an enterprise. But this should not affect their status as workers or preclude them from supporting one another, and especially the most vulnerable amongst them.

The case of the recycling cooperative provides an example of the kind of support a trade union could provide to the self-employed. This support could not only assist the cooperative in achieving recognition and becoming sustainable; it could also help to establish a model for the inclusion of the self-employed. However, this will not happen without a change of mind-set. To achieve this, core workers need to recognise others operating in the same workplace.

The workplace must always be the basis for organising workers. An extended notion of the workplace that corresponds to the place(s) where workers actually work is also a starting point for building organisation that overcomes the differences between them. Without autonomous organisations it is difficult to see how any bid to extend rights to all workers can be achieved.

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